IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0140
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
REGINO DE LEON,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053537

Honorable Ted B. Borek, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Eric J. Olsson
Tucson
Attorneys for Appellee

Jeffrey Buchella
Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 Appellant Regino De Leon was convicted after a jury trial of aggravated driving under the influence of an intoxicant (DUI) with a suspended and revoked license, aggravated driving with an alcohol concentration of .08 or greater with a suspended and revoked

license, criminal damage, and two counts of endangerment. The trial court found De Leon had a prior felony conviction and was on release when he committed these offenses. As a result, the court sentenced him to concurrent, presumptive prison terms, the longest of which was 4.5 years. On appeal, De Leon contends the court erred in admitting evidence of his prior aggravated DUI conviction, in failing to instruct the jury on negligence, and in finding he was on release when he committed the offenses. We affirm his convictions and sentences.

¶2 De Leon first asserts the trial court erroneously permitted the prosecutor to question a police officer about De Leon's admissions that he had previously been convicted of a DUI offense, had spent two-and-one-half years in prison, and was on parole at the time he committed these offenses. De Leon argues the evidence was highly prejudicial and was improperly admitted before the trial court had ruled on the prosecutor's request to impeach De Leon not only with the existence of his prior conviction but with its nature.

¶3 But De Leon has misstated the facts. Officer McGuire testified about De Leon's admissions only during a hearing held while the jury was absent. He never testified about those admissions in the presence of the jury. In fact, the only evidence the jury heard about De Leon's prior DUI conviction came from his own testimony.

¶4 De Leon also incorrectly asserts the trial court failed to comply with the requirements of Rule 609(a), Ariz. R. Evid., 17A A.R.S., by permitting the evidence without first determining that its probative value outweighed its prejudicial effect. Although the court never expressly so ruled, it clearly engaged in the required weighing during the lengthy

discussion that followed De Leon's objection to evidence about the nature of his prior conviction. *See State v. Poland*, 144 Ariz. 388, 400, 698 P.2d 183, 195 (1985) (although "specific on-the-record finding" is "preferred method" for complying with Rule 609, no reversible error occurs if it is clear court engaged in required balancing), *aff'd*, 476 U.S. 147, 106 S. Ct. 1749 (1986); *State v. Ellerson*, 125 Ariz. 249, 252, 609 P.2d 64, 67 (1980) (same), *overruled in part on other grounds by State v. Fettis*, 136 Ariz. 58, 664 P.2d 208 (1983).

¶5 In initially ruling the evidence was admissible, the court and counsel expressly discussed and the court implicitly determined that its probity outweighed its prejudicial effect. After the noon recess, the court announced it would defer ruling on the admissibility of evidence of the nature of the conviction until it heard De Leon's testimony but acknowledged it was difficult to imagine what testimony could cause it to rule the nature of the conviction was inadmissible. De Leon then took the stand and testified he had a prior DUI conviction.

¶6 Reflective of the fact the court made the required determination was its promise to instruct the jury on the limited use it could make of that testimony. In accordance with that promise, the court instructed the jury it could consider the evidence that De Leon had a prior felony conviction only in determining his believability as a witness and the evidence that the prior conviction was for a DUI offense only in deciding his guilt on the criminal damage and endangerment charges.

¶7 We find no abuse of discretion in the court's decision to permit the state to impeach De Leon with the nature of his prior conviction. *See State v. McGill*, 213 Ariz. 147, ¶ 40, 140 P.3d 930, 939 (2006) (admission of evidence reviewed for abuse of discretion). In *State v. Woody*, 173 Ariz. 561, 845 P.2d 487 (App. 1992), we upheld the trial court's decision to permit a police officer to testify about the specific acts the defendant had committed that had resulted in his prior DUI conviction. 173 Ariz. at 562-63, 845 P.2d at 488-89. We concluded the evidence was "relevant [on a second-degree murder charge] to the issue of whether [the defendant's] mental state reflected a reckless indifference to human life." *Id*. at 563, 845 P.2d at 489. The trial court here did not abuse its discretion in determining the nature of De Leon's prior conviction was admissible for the limited purpose of showing the mental state of recklessness required for the charges of criminal damage and endangerment.

¶8 We summarily reject De Leon's claim that the trial court erred in failing to instruct the jury on the definition of criminal negligence in connection with the endangerment counts. As the state correctly observes, the crime of endangerment requires a mental state of recklessness, and there are no lesser-included offenses of endangerment. *See* A.R.S. § 13-1201 (endangerment is class one misdemeanor unless it involved "substantial risk of imminent death").

¶9 Finally, we find no error in the trial court's finding that De Leon had been on release at the time he committed these offenses, an issue we review only for fundamental

error because De Leon did not object below. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Contrary to De Leon's assertion, the jury was not required by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), to make that finding. As De Leon acknowledges, A.R.S. § 13-604.02(B) requires that a defendant who commits new offenses while on release status be sentenced to no less than a presumptive prison term, as De Leon was. But a trial court's imposition of a presumptive sentence does not trigger the requirements of either *Apprendi* or *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *See State v. Johnson*, 210 Ariz. 438, ¶ 10, 111 P.3d 1038, 1041 (App. 2005); *State v. Cox*, 201 Ariz. 464, ¶¶ 17-18, 37 P.3d 437, 441-42 (App. 2002).

¶10 De Leon is also incorrect that the finding requires him to serve his sentences in their entirety. Section 13-604.02(B) expressly provides that a person who commits a new offense while on release may earn release credits pursuant to A.R.S. § 41-1604.07. In any event, that a person must serve a presumptive sentence day for day, whether pursuant to statute or because the person fails to earn or forfeits earned release credits, neither increases the sentence beyond the statutory term nor requires a particular jury finding. The sentence is still a presumptive term.

¶11 And we find no merit to De Leon's contention that the evidence does not support the court's finding. The state introduced into evidence a certified copy of De Leon's Department of Corrections (DOC) records that he had served a term in prison on his prior felony conviction and that he had been on community supervision release until August 20,

2005, two days after he committed the current offenses. There was no evidence to the contrary. That the dates were so close does not by itself, as De Leon asserts, "raise serious doubts as to the accuracy of the DOC report and the trial court[']s finding." Moreover, Officer McGuire testified, outside the presence of the jury, that De Leon had admitted on the day he committed the offenses having been in the final days of parole.

¶12 De Leon's convictions and sentences are affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge